

STATE OF CALIFORNIA  
SENATE COMMITTEE ON ENERGY, UTILITIES AND COMMUNICATIONS

REVIEW OF ISO TESTIMONY GIVEN TO  
SELECT COMMITTEE TO INVESTIGATE PRICE  
MANIPULATION OF THE WHOLESALE ENERGY MARKET

STATE CAPITOL  
ROOM 3191  
SACRAMENTO, CALIFORNIA

WEDNESDAY, SEPTEMBER 3, 2003

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Reported by:

Evelyn J. Mizak  
Shorthand Reporter

APPEARANCES

MEMBERS PRESENT

SENATOR DEBRA BOWEN, Chair

SENATOR WILLIAM MORROW, Vice Chair

SENATOR JOSEPH DUNN

STAFF PRESENT

LARRY DRIVON, Special Counsel to Committee

BOB PRATT, Legislative Counsel

RONDA PASCHAL, Consultant

ALSO PRESENT

MICHAEL KAHN, Chair, Board of Governors  
California Independent System Operator

MIKE FLORIO, Member, Board of Governors  
California Independent System Operator

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01 P-R-O-C-E-E-D-I-N-G-S

02 -- oo0oo--

03 SENATOR DUNN: Thank you, Madam Chair, for  
04 allowing us an opportunity to explore for the next few moments a  
05 follow-up to testimony that was given before the Select  
06 Committee back in February.

07 And I know that Michael is here; Michael Kahn is  
08 in the back. And I think Michael, by a letter, offered to  
09 appear and make comments on behalf of the ISO. If he wants to  
10 wander up as I'm giving prepared testimony, we can sort of  
11 short-circuit everything here.

12 Let me give a little bit of background to what  
13 brings us to this issue today before the Energy Committee. Much  
14 of this is well known by those who followed the investigation  
15 closely, but let me briefly touch upon the background.

16 Back on May 9th of '02, following revelations of  
17 market manipulation by Enron, the Select Committee propounded to  
18 certain participants in the California wholesale power market a  
19 set of questions seeking each participant's knowledge of similar  
20 practices by other participants.

21 In response to that request, we received  
22 correspondence from DWR, who stated that on November 14th '01  
23 the ISO had asked DWR's Scheduling Unit, which he calls SERS, to  
24 schedule, quote, "fictitious load," end quote, for the following  
25 weekend.

26 That disclosure in the DWR correspondence in  
27 response to the questions posed by the Select Committee then  
28 started a flurry of other correspondence back and forth between

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01 ISO and the Committee, and DWR and the Committee, et cetera.

02 On May 30th, the ISO released an Interim Report  
03 on this issue that was prepared by an outside law firm and  
04 presented to the Select Committee. And at that time, the ISO  
05 Board announced it had retained an independent investigator to  
06 determine whether any improper actions were committed in the  
07 course of the events surrounding what we call the fictitious  
08 load call.

09 Another law firm was retained to conduct that  
10 larger investigation, and they have now submitted a report in  
11 June to the ISO Board. I'll refer to that report as the  
12 Strumwasser Report and the other report as the Interim Report.

13 The Select Committee and this Committee, and I  
14 know that the President Pro Tem received information that the  
15 Strumwasser Report had been delivered to the ISO Board, and that  
16 prompted I know of at least two letters, my own and Senator  
17 Burton's, there may have been others, to the ISO Board  
18 requesting a copy of the Strumwasser Report.

19 The response that we have received over the past  
20 few weeks and months has been that there needs to be additional  
21 work done with respect to that report; it was not final.  
22 Although, neither the report states that it is a draft nor does  
23 the cover letter suggest it's a draft, but that, I understand,  
24 is between the ISO Board and the Strumwasser firm. And that  
25 there were conclusions in that report that raised very, very  
26 serious issues, including due process issues, that the ISO Board  
27 needed to handle.

28 I think that's absolutely correct. I respect

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01 that.

02 The last two months or so, month-and-a-half,  
03 there's been an exchange of letters, ultimately our request for  
04 this particular hearing.

05 We secured a copy of that report, referring to



06 the Strumwasser Report. The ISO Board submitted last week a  
07 summary of the report to us. And we did request that certain  
08 employees that had previously testified before the Select  
09 Committee under oath appear here today.

10 We were advised by the ISO Board that they  
11 initially were not aware of the report, be it draft or  
12 otherwise; that they needed to be advised and advised of their  
13 legal rights.

14 Since that time, I have received two letters from  
15 two different law firms stating that they represent certain of  
16 the individuals named in the report, that they were just  
17 notified of it, and they needed time to advise their clients and  
18 to make decisions before they could respond to our request that  
19 they come here and testify.

20 I don't have any dispute with those letters from  
21 the two outside counsel purporting to represent a number of ISO  
22 employees who were addressed in the Strumwasser Report. And I  
23 certainly will, from my perspective, believe that those lawyers  
24 need whatever time they believe is necessary to fully advise  
25 their clients.

26 I also know that ISO still needs to make  
27 decisions about where to go from here. As I mentioned, we've  
28 been advised by both the ISO Board and directly by

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01 Mr. Strumwasser that the report is not final. I have no idea  
02 how it may change or if it may change, but certainly the  
03 information contained in that report is damning in many  
04 different respects. And some difficult decisions, I'm sure,  
05 will have to be made, including in a review of the  
06 recommendations that Mr. Strumwasser gave, some of them need to  
07 be handled very, very carefully. So, although I suspect there's  
08 some doubt by some members of the ISO, I respect the difficult  
09 task that the ISO has ahead of it.

10 But we as the Legislature also have a difficult  
11 task as well, because if we accept the conclusions in this  
12 report, draft or otherwise, then potentially up to six, maybe  
13 seven, including two lawyers, provided false testimony to the  
14 Select Committee. And most of those were under oath at the time  
15 they provided false testimony.

16 That we consider to be an extraordinarily serious  
17 allegation and one, at least from this person's perspective, we  
18 believe we need to deal with, in addition to whatever the ISO  
19 Board has to do with respect to addressing the Strumwasser  
20 Report whenever it be made final with respect to the operation  
21 of the ISO. That's the ISO's business.

22 But if in fact false testimony was given before  
23 the Select Committee, it's something that the Legislature needs  
24 to, in my view, respond to.

25 Michael, I appreciate you coming today at last  
26 moment. I know it's not your favorite thing to do, obviously.  
27 Let me just ask some procedural questions.

28 The ISO did submit from your office the summary.

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01 It doesn't mention anywhere in your cover letter about it being  
02 confidential. I know that none of the individual employees that  
03 were named in Strumwasser were named in the report.

04 So, my first question to you is, what is your  
05 position as to your summary? Is it something that can be made  
06 publicly available from your perspective.

07 MR. KAHN: Thank you, Senator.

08 I don't know the answer to that, to tell you the  
09 truth. When we prepared the summary, we did it with the  
10 intention of trying to let the Senate understand what was going  
11 on.

12 So I guess my answer is that we intended it --  
 13 no, I would -- I'll give you an answer in writing the first  
 14 thing tomorrow morning.  
 15 SENATOR DUNN: That'll be fine.  
 16 MR. KAHN: I apologize, but I don't know the  
 17 answer.  
 18 SENATOR DUNN: You don't need to. We're not  
 19 trying to unnecessarily cause grievance to anyone, but obviously  
 20 there is a lot of interest in the issue within the Legislature.  
 21 If the summary can be made readily available in the Legislature,  
 22 it would certainly be helpful.  
 23 I have --  
 24 MR. KAHN: Excuse me.  
 25 I know it was prepared with the intention it be  
 26 shared in the Legislature. Was -- the intention was that you  
 27 share it with whatever legislative colleagues that you thought  
 28 appropriate, and that was without -- the purpose of everything  
 0006 in my view -- everything you said in the introduction was  
 01 correct and accurate. And I appreciate that.  
 02 And the idea was to have something that you could  
 03 share with Senator Bowen, Senator Morrow, Senator Burton, any  
 04 other colleague. So, I know that's true.  
 05 But I will -- as to the remainder of its nature  
 06 of confidentiality --  
 07 SENATOR DUNN: And specifically, Michael, because  
 08 there is one name mentioned in your summary.  
 09 MR. KAHN: Right.  
 10 SENATOR DUNN: And I just want to make sure that  
 11 that "t" is the crossed and that "i" is dotted.  
 12 MR. KAHN: Right. I appreciate that.  
 13 If I could make a couple comments. I would like,  
 14 on behalf of the ISO, to thank you for letting me come here and  
 15 talk to you. I have a couple of observations.  
 16 I think that the work you're doing, and the  
 17 inquiry you're making, is really important and completely,  
 18 entirely legitimate.  
 19 I think that your being concerned about whether  
 20 somebody testified falsely to you is your duty to investigate  
 21 that. I think it would be improper in any way, shape or form  
 22 for us to interfere with that.  
 23 My goal in my management of this, which I will  
 24 take responsibility for if there are mistakes, was solely and is  
 25 exclusively designed to try to protect the due process interests  
 26 of the people involved. That's the way I've guided this.  
 27 And I want to make absolutely clear that we  
 0007 completely feel that what you're doing is legitimate, and your  
 01 following through and pursuing this is legitimate.  
 02 We also believe we have overlapping  
 03 responsibilities. And if you would decide, for example, that  
 04 based to whatever standard, whether it's a criminal standard or  
 05 clear and convincing evidence, that you don't have proof of  
 06 perjury, but we think our people lied to you, we believe we have  
 07 the responsibility to deal with that.  
 08 And the fact that you may or may not have a  
 09 situation in which it is within your purview to deal with it, we  
 10 still have a responsibility.  
 11 It is very disturbing to think that our people  
 12 came and said to you things that weren't true. And we do intend  
 13 to get to bottom of it as best we can.  
 14 So actually, I don't have much else to say except  
 15 to tell you that in my judgment, especially given what you said,  
 16 we have no cause to complain about your conduct at all, and we  
 17

18 don't want to interfere with it. And I personally appreciate  
19 the courtesies that you've shown.  
20 When we were walking over here, a colleague said  
21 to me, "You know, we have a lot to learn from this experience."  
22 Some of it's going to be painful, you're right, but we're going  
23 to have to adopt that attitude.  
24 And I'm sure that you'll be looking over our  
25 shoulder. And, you know, if it feels like we're being grouchy,  
26 that's not a manifestation of top management's view.  
27 And I do want to introduce you to Tim Haines,  
28 who's in the back of the room, who has just come aboard, working  
0008 exclusively for me. And I'm trying best I can to fulfill the  
01 obligations that I have to you, the Senate, Senator Burton.  
02 Thank you very much.  
03 CHAIRWOMAN BOWEN: May I make a further request,  
04 that you identify Kim Haines, since --  
05 MR. KAHN: Yes, he's back there.  
06 CHAIRWOMAN BOWEN: All right. That was my first  
07 part, was he or she.  
08 MR. KAHN: It was he, Tim. I'm sorry.  
09 CHAIRWOMAN BOWEN: Tim. That narrows the field.  
10 SENATOR DUNN: Just curiosity, but what's Tim's  
11 role?  
12 MR. KAHN: Tim's role is to be sure that I have a  
13 full-time person to independently determine what's important,  
14 and what's going on, and what's happening at the ISO. So that  
15 the concern that the Board does not have sufficient resources or  
16 staff, as expressed by the State Senate, has been taken  
17 sufficiently seriously that we adopted an idea that one of you  
18 broached in one of our discussions, which was that I have an  
19 independent person working full time with total access to  
20 everything going on who reports to me.  
21 Whoever's idea it was, we did it, and we intend  
22 to do it. And I'm sure Mr. Haines will be, from time to time,  
23 talking to you or staff and other folks.  
24 SENATOR DUNN: Michael, there's a few questions I  
25 want to pose, and I will do it in a way that I don't believe  
26 will compromise the internal due process concerns that I think  
27 are legitimately present in light of the Strumwasser Report.  
0009 So, I'm going to operate actually off of your summary.  
01 MR. KAHN: Fine.  
02 SENATOR DUNN: Which, for those who are staying  
03 tuned, is a summary of major points of the Strumwasser Report.  
04 On Page 8, and I'll read it as well, too.  
05 MR. KAHN: Is it okay if Mr. Florio joins us?  
06 SENATOR DUNN: Going to Page 8, at the very  
07 bottom, your summary poses the question, as did the Strumwasser  
08 Report, "Did ISO suggest that DWR schedule a 'Fictitious Load'?"  
09 Quote, end quote.  
10 And the Strumwasser Report, as you noted there,  
11 answers that with a "Yes," that they did.  
12 MR. KAHN: Yes, sir.  
13 SENATOR DUNN: And on Page 9, and whomever  
14 drafted this part of it, I thought, did a pretty good job,  
15 summarizes the bases upon which Strumwasser concluded that in  
16 fact the phrase "fictitious load" was used.  
17 I know at top of Page 10, "Is the Scheduling of  
18 Fictitious Load Illegal?" The answer was, "Not necessarily, and  
19 specifically not in this case."  
20 In the interest of full disclosure,  
21 Mr. Strumwasser criticized me for my comments at that time as  
22 well, too.  
23

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24 MR. KAHN: We didn't mention that in the summary.  
25 SENATOR DUNN: I noticed that.  
26 CHAIRWOMAN BOWEN: He didn't fail to notice it.  
27 SENATOR DUNN: But it speaks volumes for  
28 Mr. Strumwasser, that he looked at it the way he saw it, and we

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01 appreciate it.

02 The first question that I have, Michael, as to  
03 that question of did ISO suggest that DWR schedule fictitious  
04 load, answer "Yes," as you sit here today, do you have any  
05 information to suggest a different conclusion than that reached  
06 by Mr. Strumwasser on that question?

07 MR. KAHN: Well, of course, the people who were  
08 asked said no.

09 SENATOR DUNN: Other than -- you are correct.

10 MR. KAHN: And I wasn't there. So, I just don't  
11 know.

12 But I -- it -- you know, I don't know whether  
13 it's a burden or a curse. I sometimes wonder why I wasn't  
14 recalled.

15 In my other hat in this lawyer world, I very  
16 often get he said/she said. In this case, it's the judge's.

17 CHAIRWOMAN BOWEN: Why isn't it ever he said/he  
18 said?

19 MR. KAHN: Because it's always only interesting  
20 if both are involved.

21 And those are very tough things.

22 I thought Mr. Strumwasser was really analytical.  
23 And whether that would meet a burden of proof, I don't know.

24 But, you know, that's -- the truth is that the circumstances he  
25 said were set forth, and the other -- the people said they  
26 didn't do it.

27 SENATOR DUNN: So, other than what the ISO  
28 employees actually testified to at our hearing, which was, no,

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01 they didn't say it, there's no other information available?

02 MR. KAHN: There is the -- you know, there's the  
03 negative evidence of the fact there's no document -- there's no  
04 documentary evidence that they did it. And they were pretty  
05 adamant about it, and they did not respond to the e-mails that  
06 asked them to confirm.

07 Now, I don't know why they didn't respond to the  
08 e-mails. It could be because they did it, and they didn't want  
09 to acknowledge they did it. It could be because they didn't do  
10 it.

11 But I have no independent knowledge that hasn't  
12 been shared with you. You know more about this than I do  
13 because you've read it more recently, and you've examined it  
14 more thoroughly.

15 But I will tell you in the spirit of full  
16 disclosure and honesty here, the accusations are very  
17 troubling. And I'm going to try -- you know, you have a  
18 process. I don't have one. And it's a big problem for me. I'm  
19 not sure how I'm supposed to do this.

20 And we're going to hire a lawyer. We -- I don't  
21 know if this is in the record, but what my first reaction to  
22 what to do with this report was we hired Supreme Court Justice  
23 Grodin and said, what do we do with this report? And we, you  
24 know, we then listened to him lecture to us for three hours,  
25 trying to figure out what to do.

26 You know, maybe it's good news we're in uncharted  
27 waters. But we're in uncharted waters. I don't know what I'm  
28 supposed to do and how to do this.

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01 What I think I'm going to do, which will be  
02 different the way you do it, I think what I'm going to do is  
03 treat it as an employment matter because there are employees,  
04 and try and be loyal to the human resources laws and manuals,  
05 and use that analytical structure.

06 That's what my -- we're going to hire another  
07 lawyer because Justice Grodin was substantive not procedural and  
08 he doesn't have the time. And we're going to hire another  
09 lawyer to be sure procedurally we do things right. Obviously,  
10 we're not going to use anybody internally.

11 And I think analytically what we're going to do  
12 is separate employee matters from all the other policy issues,  
13 which have to be addressed also, but I have more latitude on.

14 So, and 100,000 years ago I used to do a lot of  
15 employment work on the employer's side. And I remembered then  
16 that when there was he said/he said disputes, that we had a lot  
17 of trouble persuading arbitrators.

18 But I'm not an employment lawyer any more,  
19 haven't been for many years. I do know from my prior state  
20 experience that I have obligations to these people who work for  
21 us, and I'm going to try to handle them well, but with the  
22 understanding, this is very serious. We agree with you  
23 completely.

24 MR. DRIVON: You do recognize that there is  
25 certain circumstantial evidence looked at by Mr. Strumwasser in  
26 support of his conclusions with respect to what was said to us  
27 here?

28 MR. KAHN: Of course. And there is --

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01 MR. DRIVON: It's not in a strict sense  
02 a "they said/they said" situation.

03 MR. KAHN: It is not a clear "he said/he said"  
04 situation on either side because there is in fact -- there are  
05 the e-mails, and there were actions that occurred; people did  
06 things.

07 But the focus of the question, "Did you,  
08 Mr. Jones, say these words," which --

09 MR. DRIVON: That's not exactly 100 percent right  
10 either, because on Page 109 --

11 MR. KAHN: Now you have me at a disadvantage.

12 MR. DRIVON: We'll be happy to give you a copy of  
13 your report.

14 On Page 109 of the report, recognizing that the  
15 Senator had asked the specific question in a very precise way  
16 that you just mentioned, I then addressed the witnesses myself  
17 and said,

18 "The Senator asked a very  
19 specific question, whether very  
20 specific words were used."

21 I went on to expand that to eliminate the  
22 possibility that someone was being hyper technical with respect  
23 to their response.

24 So, not only did they say that they had not used  
25 those words, they indicated by the shaking of their heads, as  
26 noted in the record, that they had not done anything to convey  
27 that impression as well.

28 So, it's a little bit more broad than, well,

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01 maybe they didn't use the words "fictitious load;" maybe they  
02 used the word "false load, or" something.

03 MR. KAHN: Let me make something clear.

04 We got this report. And Mr. Strumwasser was  
05 working on it. We were intending to get it done. We were  
06 intending to give it to the people in question, as

07 Mr. Strumwasser had told us that that's what he anticipated we  
08 would do, and we were intending to let them tell us what their  
09 side of the story is.

10 That's what we're going to do.

11 I'm not even -- I'm not asking you to wait for  
12 us, for goodness sake. You ought to do what you need to do.

13 I -- Mr. Strumwasser was hired by us. He told  
14 us, and you correct me if I'm wrong, that he anticipated when we  
15 were finished, we would give this to all the people concerned,  
16 give them the opportunity to speak about what they thought, give  
17 him an opportunity to tell us -- I'm sorry, you're Mr. Drivon,  
18 sir?

19 MR. DRIVON: I am, sir.

20 MR. KAHN: Give Mr. Strumwasser an opportunity to  
21 make observations like Mr. Drivon, and we would have a process.  
22 That's what was anticipated.

23 We haven't done any of those things, and we do  
24 intend to do that. We -- I'm going to try to keep an open mind,  
25 but that's where we are.

26 SENATOR DUNN: Okay.

27 A few more questions, Michael. Going back to  
28 your summary again, Page 13, Question 6.2:

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01 "Were the Means by Which ISO  
02 Management Responded to the  
03 Select Committee Appropriate?"

04 And the answer is, "No," as provided by the Strumwasser Report  
05 in its reference in your summary, Michael.

06 Again, being cautious about protecting those due  
07 process concerns, some of the conclusions there talk about how,  
08 just to share it here,

09 "We conclude,"

10 This is from Strumwasser,

11 "that in the preparation and  
12 presentation of the Interim  
13 Report, in its staff testimony  
14 before the Select Committee and  
15 in,"

16 a certain person's

17 "subsequent communication with  
18 the committee, ISO misrepresented  
19 the facts, proffered misleading  
20 claims in defense of its rendition  
21 of the facts, and advanced legal  
22 arguments that were unsupportable  
23 and not made in good faith."

24 It goes on. I'm on Page 13 here, but then I'm  
25 reading from a letter I had sent to Michael which has a quote  
26 from the Strumwasser Report.

27 Then it goes on to 6.3,

28 "Were ISO's Post-Interim Report

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01 Communications with the Select  
02 Committee Accurate and  
03 Appropriate?

04 "Answer: No."

05 He sites several things, including, of course,  
06 the testimony about the November 14th call that we've already  
07 talked about; the issue of OOM transactions in '02, which, as  
08 you know, the individuals implicated there go high within ISO.

09 And then third, at the bottom of the paragraph on  
10 Page 13, a particular individual who sent us a follow-up letter  
11 which Mr. Strumwasser found to be incorrect, and another legal  
12 counsel who, on page 112 of the Strumwasser Report, concludes

13 that the positions taken by that individual were simply  
14 indefensible and, in fact, were labeled disingenuous and not a  
15 good faith interpretation of the FERC order, and materially  
16 misled the Select Committee.

17 Same question, Michael, I had before. Of all  
18 those that I covered with respect to 6.2 and 6.3, do you have  
19 any information available to you at this time that suggests that  
20 Mr. Strumwasser's conclusions in that regard are incorrect?

21 MR. KAHN: Well, let me say two things.

22 First, this is what we asked Mr. Strumwasser to  
23 do, and he did it. And we -- we represented to you in a letter  
24 that we were going to have our people do an investigation, and  
25 they were going to have an independent person double-check it.  
26 And this was what we asked Mr. Strumwasser to do.

27 And he came to very troubling conclusions. And  
28 we are going to get to the bottom of this from our perspective.

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01 To the extent that our people -- we were hit with  
02 this letter from you, the Board. Didn't know anything about  
03 this. Our reaction was, we'd better do an independent  
04 investigation, but in the meantime, we'd better do something  
05 very quick because if there's some evil going on here, we ought  
06 to stop it immediately; we can't afford to wait. We didn't  
07 realize it would take this long. We can't afford to wait.

08 If our people in doing that misrepresented to  
09 you, that's a terrible thing. We owe you an apology, and you'll  
10 probably get one.

11 In addition, the people ought to be severely  
12 dealt with, and their outside advisors have problems.

13 On the other hand, their outside advisors are  
14 people who, I think, are friends of yours, too. I mean, they  
15 are very credible, very responsible people. And I would like to  
16 hear their side of the story.

17 Mr. Robinson I know to be an extremely fine man  
18 and a really fine lawyer. And he had -- there was nothing in it  
19 for him to lie to you and have a process that was dishonest.  
20 But maybe I'm missing something.

21 So, Mr. Strumwasser has done what we asked him to  
22 do. If Mr. Strumwasser is right in any part of this, that's --  
23 we have profound obligations to both apologize to you and to  
24 rectify it.

25 But we owe it at least to hear from Mr. Robinson  
26 and the law firm involved. As of this minute, I don't think  
27 they've even seen this, seen the summary or seen the report.

28 So, in answer to your question, I know based on

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01 three years of working with this gentleman, Mr. Robinson, that  
02 this is behavior that doesn't sound consistent with what I've  
03 seen, but maybe I'm wrong. I know from working with his law  
04 firm that this is inconsistent with what I've seen, but maybe  
05 I'm wrong.

06 And I think that we have to let them express  
07 their view. And that shouldn't be the end of it. We need to  
08 hear what Mr. Strumwasser has to say about it. He's a very  
09 intelligent man, and he understands what he said here.

10 So, the only thing I can say is, it would really  
11 be inappropriate for me to say anything more about this. I am  
12 really, really troubled by this. But this -- I don't like this  
13 at all. I hate it.

14 But you know what? It does prove what we set up  
15 worked. What we didn't do was do an Interim Report and then  
16 leave it alone and let our people lie. We did an Interim  
17 Report, and then we did a more comprehensive one, and we  
18 subjected it to scrutiny.

19 And we never -- in all our discussions with  
20 Justice Grodin and everything we've done, and Michael sitting  
21 next to me, we always intended to share with you this  
22 unfortunate aspect of this. And then share with you what we  
23 learn, and share with you what we found out.

24 But in of sort a funny kind of way, thanks to you  
25 and your pressure, the process works. And if people have to be  
26 dealt with, they will be. And if we have to change things, we  
27 will do that.

28 SENATOR DUNN: I suspect Mr. Drivon and, I'm  
0019 sure, the Chair has questions, maybe Senator Morrow.

01 Michael, let me tell you where I'm coming from  
02 and why I posed the questions to you. I wasn't trying to throw  
03 any curve balls at you.

04 I absolutely respect, as I mentioned before, the  
05 difficult process you have internally, handling it not only from  
06 a policy perspective internally, but from an employment  
07 perspective, and recognizing there are certain rules and  
08 protocols and regulations that you have to follow to the "t"  
09 whenever the Board reaches final decisions on reports and what  
10 needs to be done about them.

11 At least from my perspective, speaking only for  
12 me, we have to give you the latitude to handle that stuff  
13 internally from an employment perspective.

14 I asked you the questions because I'm seeking  
15 really whether there is anything out there on the issue of  
16 potential misrepresentations made to the Committee, many of  
17 which were under oath by, if I count them, maybe six, maybe  
18 seven individuals. That, as I mentioned before, is something we  
19 have to deal with.

20 My own recommendations that I would make to the  
21 others that were involved in that prior hearing, two of them  
22 being here -- Senator Bowen and Senator Morrow -- is that we  
23 package it up and let the local district attorney decide whether  
24 there was perjury that occurred. And as to the two lawyers  
25 involved, let the State Bar examine it to determine whether any  
26 action is necessary to take.

27 But I welcome input from everybody that's  
0020 involved in this, both Committee Members, certainly Leg.

01 Counsel, obviously from the ISO Board representatives and  
02 management to handle that very specific item, among the many  
03 that are in the report, but that brings us here today, which are  
04 the possible misrepresentations that were made.

05 MR. KAHN: Let me make your job just maybe a hair  
06 easier. And again, Mr. Florio, you know what I have to work  
07 with. You have 50 percent of our Board sitting here.

08 CHAIRWOMAN BOWEN: As long as it's not a quorum.

09 MR. KAHN: I didn't think of that.

10 We instructed them to tell you the truth. We  
11 even instructed them to figure it out and tell you the truth.  
12 That was what they were supposed to do.

13 We didn't like the allegations when they  
14 happened. And, you know, we're we going to have to try to  
15 figure out whether they breached it, and we have the troubling  
16 things from Mr. Strumwasser.

17 But there's no ambiguity here. The basic,  
18 fundamental question of whether there was something wrong that  
19 was going on, and our employees were doing something wrong,  
20 which you raised, was very urgent to us. Ironically, they  
21 concluded that in that regard, they weren't doing something  
22 wrong, and Strumwasser seems to have agreed. But that, we were  
23 urgently interested in that.



25 So in this, you'll find all four Board members  
26 will say the same thing: We told them to tell you the truth. We  
27 told them to fully disclose.

28 SENATOR DUNN: Mr. Drivon.

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01 MR. DRIVON: You know, what is really, I think,  
02 more disturbing to me, as Special Counsel to the Committee, than  
03 anything else is the confirmation by the Strumwasser Report of  
04 what we suspected as we were conducting this investigation with  
05 respect to the attitudes of the ISO, of people, and our  
06 investigation.

07 It was certainly my decision to work for  
08 two-and-a-half years for free, but it was not my expectation  
09 that my job would be made harder by people that were working in  
10 the public interest and for the public benefit. Although, it  
11 was clear to me many times during the investigation, and I  
12 shared with Senator Morrow and Senator Dunn and others my  
13 feelings.

14 And I think that this is really not about  
15 November the 14th. And it isn't really, in the bottom analysis,  
16 even about the testimony that was given to the Committee.

17 From my perspective, and I think you and I,  
18 Mr. Kahn and Mr. Florio would agree, that the role of the ISO is  
19 critical to both the quality of life of Californians and to the  
20 economy of California, and that it is, in truth, a public  
21 benefit corporation.

22 I know, based on what I was told during the  
23 investigation, off the record, in phone calls and in person,  
24 that the prevailing attitude at, I'm sure, below the Board level  
25 at the ISO was that this Select Committee was conducting a witch  
26 hunt for the purpose of providing free press coverage for  
27 Senator Dunn, and that much of the intercourse between the ISO  
28 and our Committee reflected that kind of an attitude.

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01 I know that isn't your attitude. And I know it's  
02 not the attitude of Mr. Florio.

03 But there seems to be a disconnect between what  
04 was happening on the ground and what was happening in the  
05 concept that you folks had with respect to how things should be  
06 done.

07 And I think that the two paragraphs on Page 118  
08 of the Report,

09 "We have found,"  
10 this is Mr. Strumwasser,  
11 "that in the course of a wholly  
12 appropriate effort to secure  
13 power needed to maintain grid  
14 reliability, ISO's talented and  
15 dedicated staff strayed from the  
16 strictures of the ISO Tariff,  
17 misrepresented market conditions  
18 to a market participant, provided  
19 non-public market information to  
20 three market participants, falsely  
21 denied that they or a colleague  
22 had made an innocuous statement,  
23 and eventually repeated that  
24 denial under oath. In the course  
25 of doing so, ISO has been drawn  
26 into conflict with both  
27 legislative and executive  
28 branches of state government,

0023  
01 has violated its tariff, and has

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tarnished the corporation's reputation with public officials and market participants, some of whom already did not hold the ISO in high regard.

"We do not believe these were simply the misdeeds of errant mid-level employees. Our investigation has persuaded us that the events we have investigated were the easy consequences of a culture that does not respect institutions with which the ISO must work, is not committed to the rules under which the ISO must operate, and does not elicit the highest ethical conduct from those who represent the corporation. These events also indicate poor coordination of decisionmaking across organizational units and insufficient quality control in the General Counsel's Office."

That is what is probably more disturbing to me as a conclusion than what personnel actions should be taken with respect to somebody.

I think what happened was, not enough thought was given to what the response was going to be to the Committee; that an expedient way was chosen, not by what you were instructing done, but by what was actually being done; and that the gravity of the situation was not appreciated.

And then things got said, and then it became a question of, "How do we protect what we've already said," and it just got worse.

And then when other attorneys got involved in it, you know, they didn't appreciate the gravity of the situation either.

And those are the things that bother me. This Report talks about and gives a lot of examples of ISO's low regard for everybody else that's involved in the process. That's not constructive, and it doesn't have, in my mind, anything to do with due process and employees' rights. That goes right straight into your lap, to straighten out those kinds of attitudinal and institutional problems.

I mean, I guess I'm not even trying to ask a question. I'm just sort of making a statement that's based on two years of frustration.

MR. KAHN: Well, first of all, you're entirely correct. It is in my lap; it's my responsibility. And it's disturbing, and we have to pursue it.

And we have to figure out what the genesis of it is, and what's correct and what's not correct.

I disagree with you in one regard. I think, Senator Dunn, it's not a witch hunt. I think there are real

witches. I think there are really bad people here. I think Senator Dunn has already ferreted a bunch of them out, and I think there are more.

And I think that, you know, we still don't have our \$45 billion dollars back. We're still all victims of this atrocity that has happened here. And I think that any place Senator Dunn wants to look for those witches, I'm behind him

08 because there is bad doing. And I don't quarrel with him doing  
09 this.

10 Second of all, the I heard your criticism. It's  
11 very troubling, and it's something I have to pursue.

12 On the other hand, to be very honest with you,  
13 I've heard the same said of the PUC. I've heard the same said  
14 of the CEC. And to be perfectly honest with you, I've heard the  
15 same said of the Legislature in this morning's newspaper.

16 Now, Mr. Strumwasser may be entirely correct. It  
17 is deeply troubling, what he said.

18 On the other hand, we have to be careful because  
19 it is his opinion, based on his work by himself, from his  
20 experience vantage point. He may be entirely correct, and we're  
21 going to follow it up.

22 On the other hand, just to take the comment about  
23 the General Counsel's Office, we do have the situation of  
24 scrutinizing and seeing a lot of work the General Counsel does  
25 and hear him a lot. And what Mr. Strumwasser concluded was  
26 surprising. And we need to figure out what's going on.

27 Let me say one other thing. What you said is  
28 really critically important, respectfully, even if you're not

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01 right. It's that you think that, that somehow we behaved so  
02 badly in our two years dealing with you that we caused those  
03 kinds of reactions.

04 Again, I had the same reaction, that that's just  
05 appalling. And we're going to have to -- you know, this is --  
06 I'm sure, Mr. Drivon, you spent more time than me, but not that  
07 much more. And I can see the way my next number of months is  
08 going to play out. We're going to have to follow up on every  
09 one of these things.

10 I believe this is a public corporation  
11 responsible to the public, and that any oversight the Senate  
12 wants to give is appropriate, and any questions you have about  
13 this are appropriate, whether I'm sitting here or not.

14 And we're going to have work through these  
15 things, one by one, each of them, to resolve it, because the  
16 test is not whether we're doing it proper for corporate  
17 governance. The test is whether we're serving the public.

18 And I learned all this from Senator Bowen when  
19 she was explaining to me what EOB meant, and what the ISO was.  
20 We had an orientation problem, and we've got to fix it.

21 So, I'm sure this isn't the last we'll be hearing  
22 from you gentlemen and ladies about this.

23 MR. DRIVON: I have a couple of requests of you  
24 in light of your proffered cooperation.

25 First of all, in reading through this document, I  
26 have to say, I have not seen this many footnotes since I read  
27 Ford Motor Company's last Supreme Court brief.

28 And these footnotes cite a lot of documents in  
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01 them that we don't have. And unless there was something  
02 incomplete about the requests that we made, which I don't think  
03 there was, we should have gotten many of these documents.

04 So, I will ask our staff to particularize this  
05 request in terms of the documents that we see in here referenced  
06 and send it to you.

07 MR. KAHN: Send it to me. I want it to go to me,  
08 and I will deal with it personally.

09 MR. DRIVON: And the other question is, would you  
10 be prepared to support legislation that would make a public  
11 benefit corporation a fiduciary of the public?

12 MR. KAHN: To be honest with you, I don't know  
13 what that means.

14 Let me tell you, we believe we're spending the  
15 public's money, and we believe we have an obligation to -- well,  
16 we have an obligation first and foremost to follow the laws that  
17 we are given.

18 Unfortunately, as you know and as the Senators  
19 know, the laws have told us to do two different things when it  
20 comes to governance, and so we have a little bit of problem in  
21 who our master is.

22 Beyond that, we have an obligation to the public  
23 to serve the public. And if that can be expanded or reinforced  
24 in some fashion, I'd be certainly happy to look at it.

25 MR. DRIVON: It's not a fair question.

26 MR. KAHN: That's okay. You're asking the  
27 questions. I didn't read anywhere that said you had to be fair.

28 CHAIRWOMAN BOWEN: If I might, I spent some time  
0028 with this report in the last couple of days.

02 Probably the most difficult part of it is that  
03 while I was surprised by the particulars in many instances,  
04 largely I was not surprised by the more general assertions. I  
05 think it was -- the sense that the institution of the ISO is  
06 somehow superior to all other government or private sector  
07 bodies permeated a lot of its dealings with the Select  
08 Committee, with the Senate Committee, and I know don't reflect  
09 the changed ISO Board.

10 So, I think our difficulty as we look at this is  
11 less with regard to the particulars of the incidents than it is  
12 with what's always the most difficult part of change, which is  
13 changing human attitudes and changing the culture.

14 I know I've had the unfortunate experience of  
15 representing a couple of cities in which there's been recently a  
16 fair number of resignations and criminal prosecutions for  
17 political corruption. It seems to follow certain industries,  
18 most notably trash for reasons that I can't explain.

19 But, you know, in those cultures there's like a  
20 culture of personal entitlement. And that certainly isn't the  
21 case here, but there is sort of a culture of institutional  
22 superiority that I think has come across.

23 And the challenge for all of us as we look at the  
24 structure of electricity for the future is how we work in a way  
25 that lessens that, and then what we do, what the check is, if  
26 that's what we're seeing, and how we deal with it in a way that  
27 doesn't require two years to go by, and a 100-and-some page  
28 report to really put what we already knew in our faces in a much

0029 more profound kind of way.

02 MR. KAHN: You know, Senator, you're right. And  
03 let me just tell you the biggest problem that we have, and  
04 that's this governance problem. Whatever we want to do, there  
05 will be some people, and I don't say everybody or most, but  
06 there'll be some people who'll say, "Yeah, but you'll be gone  
07 pretty soon." And they're not talking about, you know, rotating  
08 us out. They're talking about nuking us all, and the next day  
09 getting a whole new board.

10 And the old proposal was selected by the  
11 management. So, you know, we've been in a transition. I  
12 thought I was going to be the head of the ISO for 48 hours, and,  
13 you know, it's almost 48 months.

14 But I have a big problem in addressing culture in  
15 that regard. We -- you know, and I have to say, no disrespect  
16 to the world of what's going on, but when I tried to begin to  
17 address it, I had to wait until THE election was over, and then,  
18 all of a sudden, I had a new election. And now I've got to wait  
19 until the new election's over.

20 But I'm -- as soon as the new election's over,  
21 and we finally figure out who our government is, we need to  
22 straighten this out. We need to either, you know, abolish the  
23 ISO and create a new structure that you have absolute control  
24 over, or we need to have our Senators and Congress people go to  
25 Congress and make Pat Wood do what we need. Because until we  
26 are in charge really, and not just until some court throws us  
27 out, what you are interested in, what Senator Dunn has told me  
28 very articulately and forcefully about it, think about it from

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01 my perspective. It's very, very hard. People think to  
02 themselves, well, I'm just one injunction away.

03 So, I just say to you, I'm going to come back to  
04 you. I haven't quit on this. I've worked really hard, and you  
05 people, your offices have been very helpful in participating.

06 But we don't have command and control here.

07 CHAIRWOMAN BOWEN: This is not a problem that is  
08 unique to the ISO, if it makes you feel any better. This is an  
09 issue -- this was a huge issue with the California Lottery some  
10 years ago, because there's no budgetary control of the  
11 California Lottery by the Legislature. It was set up that way  
12 by the initiative that created it. It was intended to make it  
13 run more like a business by isolating the budget from  
14 legislative oversight and control.

15 The result was, you know, all sorts of  
16 contracting nightmares, and administrative expenses out of  
17 control. And there was nobody who had the power to say, "You  
18 just can't do that any more."

19 So, I don't want you to feel like you're in that  
20 seat alone, but it is a difficult situation. I agree. You have  
21 identified the biggest impediment to dealing with this, which is  
22 the lines of accountability are muddy.

23 MR. KAHN: And, you know, we have on a number of  
24 occasions, not enough for you folks, and I understand that, but  
25 on a number of occasions we have just said to FERC, "No." And  
26 they've told us that they're the bosses, not the least of which  
27 is in the governance thing.

28 So, I hear you, and maybe I'm not very good at --

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01 CHAIRWOMAN BOWEN: It'll be interesting to see  
02 what FERC makes of this report when it's finalized, or how they  
03 view whether or not that contributes, whether or not they're  
04 willing to do the kind of oversight that's necessary. I  
05 suggest that they're not.

06 MR. KAHN: Well, I think --

07 CHAIRWOMAN BOWEN: They're barely equipped to  
08 deal with market issues much less --

09 MR. KAHN: This is a different issue, but I think  
10 that the cultural -- how to say this tactfully -- one might ask  
11 the administrators of the federal and state courts how they view  
12 each other, how they're run. And one might hear the same  
13 attitude from a state court person talking to federal court  
14 person, that the other thinks they're superior and knows what  
15 they're doing, and whatever.

16 I think there is a view at FERC -- well, first of  
17 all, this is no secret, we all know. We were declared  
18 incompetent idiots. That was the reason for the California  
19 electricity crisis. We screwed it all up, and we were stupid,  
20 and we didn't build enough electricity, and we didn't do  
21 anything right, and we were nincompoops.

22 But guess who knew what they were doing? The one  
23 agency that was set up by FERC and run by FERC.

24 So, I don't think -- I'm not sure that  
25 Mr. Drivon's comments will be received by FERC as an insult.

26 We have a problem, and we need all of us to  
 27 address it.  
 28 MR. DRIVON: But, you know, I'm going to get just  
 0032 a little bit specific for just a minute.  
 01 You've got, I mean, and there just isn't any  
 02 question about this. There came a very large political football  
 03 having to do with out-of-market purchases. And I don't want to  
 04 get into a technical acronym-filled discussion here, because I  
 05 don't think it has much to do with anything.  
 06 But we received in writing assurances from the  
 07 top levels of ISO, the top executive levels of ISO that there  
 08 were no requests of DWR to make OOM purchases during the year  
 09 2002. And that stood as the state of the evidence until this  
 10 Committee turned up tape recordings that were absolutely in  
 11 opposite to that. And that's discussed in the report, in  
 12 Strumwasser's Report as well.  
 13 But, I mean, I have an absolutely clear memory of  
 14 that, because we were trying to figure out, you know, the  
 15 dominoes are spread out here. How can this be happening?  
 16 What's working? We'd better find out whether or not these  
 17 requests for OOM purchases are being made.  
 18 This is back when we thought that the details  
 19 were important.  
 20 And, you know, so we asked. It seemed like the  
 21 reasonable thing to do. And we got not one, but two written  
 22 responses from the two people at ISO, one of whom has the  
 23 ultimate responsibility, and the other one was the person who  
 24 was in charge of that area. And both of them said, "Absolutely  
 25 not."  
 26 And then, with our unlimited resources as a  
 27 Committee, you know, we dig up these tape recordings.  
 0033 And that's -- that's just an example.  
 01 MR. KAHN: That's not cultural. That's just  
 02 unacceptable.  
 03 MR. DRIVON: And that's what I'm saying. This is  
 04 not just a cultural, you know, we've-got-problems-with-  
 05 governance situation. I mean, this is either a total disregard  
 06 for this Committee and for what it was asking, or total  
 07 incompetence, or a total cover-up, one of the three. There's no  
 08 other way around it. It's got to be one of those three.  
 09 I have my opinions, which I won't express because  
 10 I have before.  
 11 CHAIRWOMAN BOWEN: I think we obviously have more  
 12 work to do on this issue, and Mr. Morrow, obviously, gets a bite  
 13 of the apple if he wants one.  
 14 SENATOR MORROW: I don't want to miss the  
 15 opportunity.  
 16 It's not like I delight in taking part in a  
 17 public flogging.  
 18 But Mr. Kahn, you characterized this report  
 19 yourself as being very disturbing. I think that's really  
 20 putting it lightly. It's damn damning.  
 21 And just so there's no mistake as far as my  
 22 position in this, I wholeheartedly embrace the comments made by  
 23 Senators Dunn, Bowen and Mr. Drivon in every respect.  
 24 Aside from all those concerns that I think have  
 25 been adequately expressed, I have somewhat of another concern.  
 26 I mean, at first blush when I saw the report by the  
 27 investigator, Mr. Strumwasser here, at least my knee-jerk  
 0034 reaction: very thorough. I've seen a lot of investigations and  
 01 reports in my life. Very detailed, footnoted. At least at

03 first blush, I can't find anything to criticize it in terms of  
04 substance.

05 It wasn't until today, and maybe you can clarify  
06 if for me, because I'm not sure what the process is. I haven't  
07 had a chance to read your summary yet, which I only received  
08 today. So, I'm somewhat at a disadvantage.

09 But apparently we received a letter from  
10 Mr. Strumwasser indicating that he is still in the process of  
11 revising the draft that had been earlier provided to the Board  
12 of Governors, presumably meaning this report.

13 Tell me what the process is? I mean, I got to  
14 tell you that when I first looked at this thing, which was  
15 submitted, it's dated June 3rd, 2003, which was three months  
16 ago, and I have read this. Maybe you can show me if I missed it  
17 somewhere, where it identified itself as a preliminary draft or  
18 anything else. This seems to be fully complete. It's got very  
19 specific recommendations in the end.

20 Before I go on, how do you respond to that? This  
21 is not the final draft or what? What can we expect?

22 MR. FLORIO: Well, the Board, as you might  
23 expect, had a lot concerns but also questions about things in  
24 the report that were conveyed to Mr. Strumwasser, and he is  
25 doing some further investigation on some of the points, and is,  
26 to some degree, revising or expanding upon some of the aspects  
27 of it. So, the work is ongoing.

28 And hopefully it will be completed very soon, but

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01 we have seen -- and I'm sure I bear a fair share of  
02 responsibility for this. It has taken a long time. And, you  
03 know, he has other projects that distract him from time to time.  
04 And we haven't been able to do this as timely, certainly, as I  
05 would have liked.

06 SENATOR MORROW: Maybe if you can just tease me  
07 with a little bit of what to expect?

08 I mean, again, reading this thing, it seems so  
09 very thorough. It covered all the points that I can see.

10 What is left to be investigated? What are the  
11 questions you have in mind that he's looking into, and we can  
12 expect a report back from him, or you can at least.

13 MR. FLORIO: I apologize. I don't remember,  
14 sitting here today, what the issues were, but there were quite a  
15 number of further questions that were asked. And it wasn't in  
16 writing. It was a meeting between myself and Governor Guardino  
17 that are the subcommittee and Mr. Strumwasser, where we, you  
18 know, conveyed the questions and concerns of the Board.

19 And he -- he, you know, in a number of instances  
20 said, yes, there was more work to be done there, and he  
21 proceeded to do that.

22 I'm expecting a final report within a couple of  
23 weeks, but I've said that before and it's turned out not to be  
24 true. So, I don't want to --

25 SENATOR MORROW: Well, Mr. Florio, I hope you can  
26 appreciate. Your answer given right now, no offense, but I find  
27 it less than satisfying here.

28 I mean, I am concerned about the fact, again,

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01 apparently you've had this report somewhere around June 3rd,  
02 2003.

03 Now, I remember the hearing, the open public  
04 hearing, when this issue came up. And I remember the ISO, and  
05 everybody affiliated with the ISO, basically the pitch to us as  
06 a Committee was, "Hey, thanks for bringing this to our  
07 attention. We're going to look into it. We're going to get to  
08 the bottom of this," and "we have a public duty," which I've

09 heard reiterated here today.

10 Although, I don't necessarily remember any  
11 commitment, and I could be wrong on this, but I don't have a  
12 present recollection of anybody saying, "You know, Select  
13 Committee, Senator Dunn, and all you, we'll give you a copy of  
14 the report. You're part of the process. You will get this."  
15 Nevertheless, it was certainly implied to me that  
16 whatever your findings were, the results of your investigation  
17 were going to be made known to the Committee.

18 Maybe I presumed too much. If I did, I'd like  
19 for you to tell me that. And if I didn't presume too much, I'm  
20 a little disturbed that this Committee got this report in the  
21 fashion that it did.

22 MR. KAHN: I -- you know, first of all, we owed  
23 you answers to your questions. And we -- we think in the  
24 summary we provided you, we've given you an installment of  
25 that.

26 I don't know how you got this report. If you  
27 could tell us how you got the report, we would be happy.

28 SENATOR MORROW: One thing you do know. We

0037 didn't get it from you.

01 MR. KAHN: Right, you didn't get it from us  
02 because it was in our subcommittee with Mr. Florio and  
03 Mr. Guardino and Mr. Strumwasser. It was -- they were working  
04 it. And they told the remainder of the other Governors that,  
05 and Professor -- excuse me, Justice Grodin, that we were going  
06 to get a further work product.

07 And we're here today based on new circumstances.

08 SENATOR MORROW: And forgive me, and I hope you  
09 appreciate that having served on the Select Committee, the  
10 investigation that we've had for two years now, and I think  
11 we've encountered the best. The oil companies -- that's another  
12 fight -- the energy companies, government bureaucracies, I mean,  
13 you name them all, ISO, utilities, and everybody playing Hide  
14 the Ball, and we have to pull teeth.

15 The question that is inescapable in my mind --  
16 and I'll leave it up to the Chair whether or not he wants to  
17 disclose how it was received. All you need to know is, it  
18 certainly wasn't disclosed officially by the ISO Board, the  
19 people who are the recipients of this report -- that had we not  
20 received it, would we be here at all? When, if ever, would we  
21 have this information that's in this report?

22 MR. KAHN: Well, the answer to that is, actually,  
23 you have the information that was in the report. That's -- we  
24 gave you a summary on Friday. As of this Friday, we still --  
25 we, Mr. Florio and I -- didn't know you had the report.

26 And we've been spending -- you know, the summary  
27 which we prepared, which is, I don't know, some 14 pages long,

0038 wasn't prepared in one day. It took a number of months of  
01 people to put it together.

02 SENATOR MORROW: I appreciate that.

03 MR. KAHN: I'm sorry. But Senator, in answer to  
04 your question, what we decided to do when we got this report was  
05 two things.

06 One, the subcommittee work with Mr. Strumwasser  
07 to move to a final report.

08 Two, we recognized that it was not going to be  
09 satisfactory to say to you, the Senate, we want you to wait  
10 forever. Regardless of how long it takes, we want you to wait.  
11 We recognized you wanted answers to your questions. And so, we  
12 entered into two processes simultaneously, and both of which  
13 were -- Mr. Florio was responsible for.



15 One was the process of finishing the report. Two  
16 was the process of producing a summary.

17 And as Senator Dunn has so well shown, this isn't  
18 exactly the friendliest summary to the ISO. This admits a lot  
19 of problems and sets them forth, and fairly candidly expresses  
20 the findings of Mr. Strumwasser.

21 So, in answer to your specific question, Senator,  
22 we -- whether you had the report or not, we could still be here  
23 based on the fact that we provided you with the information.

24 And finally --

25 SENATOR MORROW: Are you saying you didn't know  
26 that we had this report until last Friday?

27 MR. KAHN: I had no knowledge that you had this  
28 report for sure. I had rumors that you might have it or not,

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01 but I cannot act on rumors, and I did not have any  
02 confirmation.

03 And if you read Senator Dunn's letter, it does  
04 not say you have the report.

05 SENATOR DUNN: Let me, if I can, clarify the  
06 record, Bill, so you know.

07 I first contacted, actually, Barry Goode about  
08 the fact that I had received the report. That was probably a  
09 month ago, about a month ago.

10 Mr. Goode indicated to me he had no knowledge  
11 about the report, and indicated that the ISO, correctly, is a  
12 separate entity.

13 But he said that he would contact the ISO Board,  
14 which I presume was Michael Kahn.

15 He reported back to me about a week later that he  
16 spoke with the ISO Board, requested a report, but due to  
17 confidentiality associated with the report, his request was  
18 declined.

19 SENATOR MORROW: And when was that?

20 SENATOR DUNN: About a month ago.

21 So at that point in time, Mr. Goode asked if I  
22 would provide him a copy of the report, and I chose not to for  
23 probably the same reasons of whomever --

24 SENATOR MORROW: So, from what I think I'm  
25 hearing, Senator Dunn, is that the ISO Board was aware of our  
26 requesting this report a month ago.

27 SENATOR DUNN: Well, actually when  
28 Mr. Strumwasser started his report, at least my recollection is,

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01 there was always an agreement that when completed, the Select  
02 Committee would be given a copy of Mr. Strumwasser's Report.  
03 That was way back.

04 SENATOR MORROW: That was my understanding as  
05 well.

06 But I'm also hearing that, again, a request was  
07 made a month ago, and but for all the things that have  
08 transpired in the last month, here we are pulling teeth again,  
09 and we have to call you into a hearing to discuss this report.  
10 And it's only on Friday, and I don't get it until today, that we  
11 have a summary.

12 I don't know where to go with this, other than to  
13 express frustration. I've seen it time and again. And again,  
14 we're pulling teeth for more information.

15 It's again very indicative of the very criticisms  
16 that are in this report about how the ISO views other agencies,  
17 including the Legislature.

18 SENATOR DUNN: If I can just add one thing, Bill,  
19 so that we're complete on the picture.

20 My request was actually to have the individuals

21 who had testified about the fictitious load come before the  
22 Committee.

23 The request wasn't for Mr. Kahn or Mr. Florio.  
24 They volunteered to come since those individuals now have  
25 retained their own outside legal counsel, who sent letters this  
26 morning saying their respective clients, the individuals who  
27 testified on the fictitious load hearing, would not be present  
28 because that legal counsel had just been hired and needed to be

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01 educated on the issues before they would present their clients  
02 for further testimony.

03 And as a substitute, both Mr. Kahn and Mr.  
04 Florio.

05 SENATOR MORROW: I understand. I appreciate  
06 that, Senator.

07 Again, the question in my mind, but for all of  
08 those things that have transpired, when would we have received  
09 this report?

10 I know when we received, at least officially, the  
11 summary of this report, but I just can't help but posing that  
12 question.

13 MR. DRIVON: What I would like to know is  
14 whether, when the next version of Mr. Strumwasser's Report is  
15 ready, can we expect that you will immediately forward a copy of  
16 it to us, or do we go back to the little birdy approach?

17 MR. KAHN: I don't know what the little birdy  
18 approach is, but let me --

19 MR. DRIVON: That's how we got this one, a little  
20 birdy.

21 MR. KAHN: But let me tell you the answer is that  
22 the counsel for one of the -- counsel for one of the people  
23 named has requested that we not release portions of the report  
24 which he believes are attorney-client privilege, and he believes  
25 that the information provided to Mr. Strumwasser was given to  
26 him in a privileged context, and therefore, it's not appropriate  
27 to have that privilege breached.

28 And he also takes the position that he hasn't

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01 read the report yet, so he doesn't know whether he's right or  
02 not, but he takes the position that there would or could have  
03 been things said to Mr. Strumwasser that, if they were quoted,  
04 and then put in the report, were a breach of the representation  
05 of confidentiality.

06 I have no idea if this is true. But I can tell  
07 you this. We didn't -- we did not -- and again, Senator Morrow,  
08 I apologize for the frustration, but I have to tell you, we did  
09 not tell people it was voluntary to talk to Mr. Strumwasser. We  
10 told them that they had to talk to Mr. Strumwasser, and that  
11 they had to cooperate.

12 And now there is a report that says things about  
13 them that they're unhappy about. And some of them have raised  
14 the question of the circumstances of the information.

15 I'm going to hire a lawyer. That's out of the  
16 expertise of Justice Grodin. I'm going to have to hire a lawyer  
17 and figure out what to do.

18 You know, it's nothing to do with birdies, or  
19 predelictions, or whatever. It has to do with if Mr.  
20 Strumwasser said to somebody, "This is a privileged  
21 conversation. I promise I won't reveal it to anybody. Tell  
22 me --" well, a little bit like Connie Chung said to Newt  
23 Gingrich's mother, "Off the record, what do you think?"

24 If those people answered, believing that they  
25 were not going to be quoted in a report, I don't know what that  
26 means. That may mean nevertheless you get it.

27 And Senator Dunn, the one thing I know from  
28 experience, you'll ask us to waive the privilege. And it may  
0043 not seem like it, but every time you ask us to waive the  
01 privilege, we spend a whole lot of time trying to sort through  
02 it, and trying to respond to it, and trying to figure out a way  
03 that we can deal with it.

04 So, I apologize if it sounds like mumbo-jumbo,  
05 but I just told you the truth. And that's where we are.  
06 MR. DRIVON: It's actually covered on Page 3 of  
07 Mr. Strumwasser's Report:

08 "In the course of this  
09 investigation, we interviewed  
10 critics of ISO to illuminate the  
11 charges, percipient witnesses to  
12 test those charges, and ISO  
13 management to learn their  
14 perspective on the charges and on  
15 the broader issues charges raise.  
16 Each interview was tape-recorded.  
17 Each interviewee was advised  
18 that, if he or she preferred, we  
19 would pause or stop the recording  
20 and would respect any request  
21 that we maintain the  
22 confidentiality of information  
23 provided us off the record. No  
24 such statements are quoted or  
25 attributed in this report."

26 MR. KAHN: Right. That's what Mr. Strumwasser  
27 says. I hope it's true.

0044 But I'm not -- I can't take Mr. Strumwasser's  
01 word for it. I have to give somebody the benefit of the doubt  
02 if they don't agree with that.

03 You know, if everybody agrees with what  
04 Mr. Strumwasser said, then I'll call back that lawyer and say,  
05 who hasn't even read this, "Hey, you don't have a beef."

06 But I have to be fair. I have to let the people  
07 who talked to him have the opportunity to say what they want to  
08 say. And I can't just trample their rights. I have to do it  
09 one step at a time. I'm sorry.

10 MR. DRIVON: In the tape recordings, I'm sure,  
11 with a lawyer that's as careful and experienced as  
12 Mr. Strumwasser, I'm sure that the tape recordings would reflect  
13 admonition to the witness exactly as he sets it forth. So  
14 perhaps you can just listen to one of those tape recordings or  
15 several.

16 MR. KAHN: I think that's a good idea. I hope  
17 it's not more than several.

18 SENATOR MORROW: Just one more question.  
19 You've had two months now, or three months, to  
20 grapple with these issues that we're talking about. And  
21 apparently you haven't come to a conclusion yet in the course of  
22 the day.

23 How long is it going to take?

24 MR. KAHN: Well, that's not --

25 SENATOR MORROW: Is that an unfair question?

26 MR. KAHN: No, that's not an unfair question, but  
27 respectfully, it's not quite an accurate statement.

0045 When we got the report, we read it. And we hired  
01 counsel. And we looked at it really, really carefully to  
02 determine whether there was wrong-doing or conduct involved here  
03

04 that we had to change immediately.

05 For example, I mean, to get back to the original  
06 premise of the question, were we engaging in improper activity  
07 that was harmful to the citizens of California?

08 And we read the report, I did. Maybe I missed  
09 it, but I didn't see anything that said, "You'd better stop  
10 interfering with processes," and the like.

11 So, the first thing we did was to try to see if  
12 we had an immediate obligation to do something.

13 Next thing we did was to try to decide how we  
14 were going to discharge our obligations. And we -- I know it  
15 didn't make you happy, I apologize, but we commissioned a  
16 summary to respond to your questions. We commissioned Justice  
17 Grodin to figure out what to do with the report. And we started  
18 down the process of dealing with the personnel issues and the  
19 practices issues.

20 And we took some other actions which are  
21 sensitive, but basically we changed some people from doing  
22 things that they were doing because it was -- there was an  
23 allegation that they were behaving improperly. We took some  
24 actions which are -- I'd need some privilege to be able to share  
25 with you. But it's not huge. You can figure it out, what we  
26 did.

27 So, we didn't just do anything. We took a lot of  
28 steps. And we're in the process of taking a lot of steps.

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01 That's where we are.

02 SENATOR DUNN: No questions, but we need to steal  
03 that copy back. We're maintaining quite a tight lid on all of  
04 these.

05 MR. KAHN: Yeah, there you go.

06 MR. FLORIO: Could I add one thing?

07 Maybe the time has passed, but we were talking  
08 about the issue of culture, and not being responsive to the  
09 Committee.

10 I just wanted for the record to point out that  
11 this is not something that this Board has ignored. Back earlier  
12 this year, before there was any kind of report from Strumwasser,  
13 after one of the hearings of the Select Committee, I heard from  
14 some folks who had attended that, you know, the ISO had not put  
15 on a good performance that day.

16 I relayed those concerns to Chairman Kahn, and he  
17 immediately followed up with the individuals involved, raised  
18 the concerns with management, and laid down the law at the next  
19 Board meeting about what we expected in terms of cooperation  
20 with the Legislature.

21 And I do think we've seen improvement in the  
22 relationship since those events took place. And I believe there  
23 was some cooperative work around the locational marginal pricing  
24 issue, and concerns that the Legislature expressed.

25 And I think we are making some progress in  
26 breaking down some of those attitudes that are ingrained. So  
27 certainly, we're not just sitting on our thumbs. We are trying  
28 to address this and achieve the kind of relationship that we

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01 should have had all along with this Legislature.

02 CHAIRWOMAN BOWEN: I think it's important to  
03 state that while there are concerns raised about the various  
04 people who have been interviewed here, and about attitude and  
05 hostility, and so forth, that there are many people who work at  
06 the ISO who don't have that problem.

07 I want to be careful that we don't simply take a  
08 bucket of paint and throw it on everybody who works at the ISO,  
09 because this report is specific to certain people.

Certainly, I think all of us in our dealings with ISO have had good experiences as well as ones that we wish we hadn't had.

So, I think we need to be careful and be specific, but we also need to both deal with the institutional issues and then figure out how we are going to deal with those places where there remains a problem.

So, we don't have a clearance as to when we're going to get a final report; is that correct? I'm left not knowing when we might receive --

MR. KAHN: I think that's fair. We don't have a clue. We don't know what we're going to do next.

We thought we were going to wait until Strumwasser and Guardino and Florio had finished and given us something, and we aborted that. Instead, their process is still going on, but instead I, with the consultation of my Board, immediately provided -- took steps to provide -- I don't think they actually finished yet -- each of the people copies of the report, frankly, to facilitate your process. So, that has gone

on.

Now, what that's going to mean to me now, it's going to take a life of its own. I'm now going to start hearing from lawyers about what I can and can't do. And my next, very next step is to hire myself a lawyer.

CHAIRWOMAN BOWEN: Next time you volunteer --

MR. KAHN: Let the record reflect, I never volunteered for this. I was ordered.

CHAIRWOMAN BOWEN: Next time you are asked to serve the public, I think we've all spent plenty of time doing things that we'd rather not be doing during the course of events that have transpired since AB 1890.

MR. DRIVON: One more thing.

CHAIRWOMAN BOWEN: One more thing, and I do mean one more thing, because you've had four more "one more things." If you were four years old, I would have cut you off already.

MR. DRIVON: I'm a lawyer.

And I mean this sincerely, Mr. Kahn, Mr. Florio, I don't see this as an adversary situation. I really don't.

If there's anything that I or our staff can do to help at any level in what you have to do, because it's a hard job you have to do, you know, we're available, and at whatever level you want that to be.

MR. KAHN: I appreciate that.

Senator Dunn and Senator Bowen know that on the overarching issue of governance, culture, fixing the direction, and the like, I firmly believe that the only way we're going to succeed is a partnership between the legislative branches and

the executive branch with those of us who are in your service trying to facilitate that. So, I agree completely with you.

And I also agree with Mr. Florio. The locational marginal pricing situation, and whether we had a cost benefit analysis, and all those other things, that result was entirely because you laid down a marker. You said what you wanted, and I insisted that we treat that with the greatest amount of deference and respect. I wasn't willing to go forward until we had worked in a partnership with you, and we did. And I wasn't willing to take somebody's word for it. I wanted to see it in writing that you folks were satisfied, or we weren't going to do it.

And so, I appreciate your offer. We're going to take you up on it, but we already have in part in the substantive area.

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CHAIRWOMAN BOWEN: All right. That concludes  
today's hearing. I want to thank everyone who has participated.  
We're adjourned, and you are excused.  
[Thereupon this portion of the  
hearing of the Senate Committee  
on Energy, Utilities and  
Communications was terminated at  
approximately 5:45 P.M.]

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01 CERTIFICATE OF SHORTHAND REPORTER

02

03 I, EVELYN J. MIZAK, a Shorthand Reporter of the State  
04 of California, do hereby certify:

05 That I am a disinterested person herein; that the  
06 foregoing transcript of the hearing of the Senate Committee on  
07 Energy, Utilities and Communications was reported verbatim in  
08 shorthand by me, Evelyn J. Mizak, and thereafter transcribed  
09 into typewriting.

10 I further certify that I am not of counsel or  
11 attorney for any of the parties to said hearing, nor in any way  
12 interested in the outcome of said hearing.

13 IN WITNESS WHEREOF, I have hereunto set my hand this  
14 \_\_\_\_\_ day of \_\_\_\_\_, 2003.

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EVELYN J. MIZAK  
Shorthand Reporter